Supreme Court, U. S.
FILED
JUN 26 1978
MICHAEL RODAK, JR., CLERK

IN THE
UNITED STATES SUPREME COURT

OVIDE DUNCANTELL, JR., Petitioner	§	
v.	§	Number
THE STATE OF TEXAS, Respondent	§	77-1831

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Submitted by:

Peter D. Williamson
821 Americana Building
Houston, Texas 77002
(713) 751-0222

Attorney for Petitioner

Of Counsel:

Jesse Funchess
Attorney at Law
6203 Del Rio
Houston, Texas 77021
(713) 747-2991

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IN THE UNITED STATES SUPREME COURT

OVIDE DUNCANTELL, JR.,	I	
Petitioner	I	
v.	I	NUMBER
THE STATE OF TEXAS,	I	
Respondent	I	

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes the Petitioner, Ovide Duncantell, Jr., pursuant to Rule 23 of the Supreme Court Rules, and submits this Petition for Writ of Certiorari, asking the United States Supreme Court to review a decision by the Court of Criminal Appeals of Texas.

LOWER COURT OPINION

At the time of this Petition, the opinion of the Court of Criminal Appeals of Texas has not been published. A true copy thereof is attached and appended hereto as provided in Rule 23 (i).

TIME LIMITATIONS

The opinion of the Court of Criminal Appeals of Texas, of which the Petitioner complains was delivered on March 15, 1978. Thereafter, a Motion for Leave to File a Motion for Rehearing was filed with the Court of Criminal Appeals, which Motion for Leave to File was denied on April 5, 1978.

JURISDICTION OF THIS COURT

Petitioner would show that this Court has jurisdiction to review the Judgment in question by Writ of Certiorari, pursuant to 28 U.S.C. 1257(3).

QUESTIONS FOR REVIEW

There are two questions for review presented in this cause:

First, whether or not the scope of the search of an automobile stopped for a traffic offense, extends into matchboxes located upon the automobile's dashboard.

Second, whether the prosecutor's use of peremptory strikes to remove all black people from the jury panel deprives a black defendant of his right to due process of law and equal protection of the laws.

CONSTITUTIONAL PROVISIONS INVOLVED

The defendant relies on the Fourth Amendment to the United States Constitution, forbidding unreasonable searches and siezures.

The defendant relies upon the Fifth and Fourteenth Amendments to the Constitution of the United States, which guarantee him the right to a fair trial and to due process and equal protection of the law.

> AMENDMENT IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V: "No person shall...be deprived of life, liberty, or property without due process of law;..."

AMENDMENT XIV: "Section 1...Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws."

STATEMENT OF THE CASE

The petitioner was a black man, well known in this community for his protests against racial discrimination. He was a candidate for city council in the Houston municipal elections to be held shortly after the date of his arrest.

Late at night, the car driven by the petitioner was stopped for a traffic violation. A melee ensued. The petitioner was removed from his car, and was on the ground handcuffed. Only then did an officer search the petitioner's car. Upon the dashboard he found a matchbox containing marijuana. The officer testified that he was not in danger, but that he was looking for weapons or evidence. The Trial Court overruled the motion to suppress this evidence; and a divided Court of Criminal Appeals sustained the validity of this search.

Petitioner then complains that during the period of voir dire of the jury, the prosecutor used his peremptory challenges to strike all qualified black people from the jury panel. Counsel for the petitioner complained immediately to the Trial Judge. The Trial Judge curtly overruled the objection, and did not permit the petitioner's counsel to inquire of the prosecutor as to the reasons for his having struck the black people from the jury. Petitioner claims that this procedure violated his right to a fair trial and violated his right to due process and equal protection of law, because he was not even permitted to inquire as to the reasons for the use of the peremptory challenges in this manner by the government.

Insofar as the Fourth Amendment claim of the petitioner is concerned, the petitioner filed a motion to suppress the evidence in the Trial Court. This motion was ruled upon at a separate hearing outside the presence of the jury, during the trial, and was overruled. The motion was based upon the Fourth Amendment to the United States Constitution. In the Appeal to the Court of Criminal Appeals of Texas, the complaint of the illegal search was again raised and discussed, having been briefed by both sides and having been ruled upon the Court of Criminal Appeals.

With reference to the matters involved in this search, the attention of this Court is drawn to the following portions of the statement of facts: page 154, line 19 to page 214, line 4.

With reference to the portion of the record in the Court below concerning the peremptory challenges, at the time it became obvious that the State had used its peremptory challenges to remove all black persons from the jury panel, appellant's counsel complained loudly and vociferously. Counsel attempted to place before the trial judge inquiries of the prosecutor, as to the reasons for his having removed all black persons from the jury panel. Counsel referred to the due process and fair trial provisions of the United States Constitution. See statement of facts at page 73, line 1 through page 75, line 24.

ARGUMENT AND AUTHORITIES

Question for Review Number One (restated): Whether or not the scope of the search of an automobile stopped for a traffic offense extends into matchboxes located upon the automobile's dashboard.

The Court of Criminal Appeals of Texas erred in upholding the warrantless search. The petitioner's automobile was stopped for a traffic offense, speeding. There was no probable cause for a search. Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970). There were no fruits or instrumentalities of the speeding offense, for which there was probable cause to search.

Officer Miller of the Houston Police Department testified that in the early morning hours of

November 12, 1971, he saw the petitioner's automobile pull onto Dowling Street in Houston, driving without lights. A minute or so later, the driver turned on his lights, and began speeding --47 miles per hour in a 30 mile per hour zone. Officer Miller, in a marked patrol car, attempted to stop petitioner's vehicle by use of lights and siren. After several blocks, petitioner stopped his vehicle.

According to the officers' testimony, Officer Miller and Officer Trumble (Miller's partner) approached petitioner's vehicle on foot. The officers testified that a struggle ensued and petitioner was removed from his car by the two policemen. Petitioner was placed on the ground in a prone position, and handcuffed.

During the struggle, Officer Trumble had placed an "officer assist" call on the police radio.

Officer M. L. Bell then arrived. The Petitioner was on the ground, handcuffed, and "all the struggling had just about ceased." (S.F. p. 155, l. 25). Bell then searched the Petitioner's automobile and located a penny matchbox of marijuana on the left front dashboard. (S.F. p. 156, l. 8-14).

Bell testified that he searched the car, looking "for weapons and the evidence to be used against the defendant." (S.F. p. 156, l. 18-21).

"Q: ...You were not looking for any weapons

in order to protect your safety or the safety of the other officers that were out there; were you?

"A: No sir, I wasn't in fear of my life." (S.F. p. 166, l. 2-6).

At some point during Officer Miller's contact with the petitioner, after the initial stop and before the petitioner was taken to the hospital after the arrest, he testified that he smelled alcohol on the petitioner's breath. (S.F. p. 98, l. 16-25). The petitioner was given a breathalyzer test, and blew 0.07 per cent.

A search without a warrant is reasonable in scope, only if that scope is limited to the purpose for which its initiation is justified. The police officers testified that they smelled alcohol on the petitioner's breath. Subsequently, they gave him a breathalyzer examination. Under the law, that would have permitted them to search for alcoholic beverages. But there is no alcohol to be found in a penny matchbox.

The officers testified that this was not a protective search for weapons. At the time of the search, the appellant was outside the car, on the ground, handcuffed. See Terry v. Ohio, 392 U.S. 1 (1968). The officers further testified that they were not in fear for their lives at the time the search was conducted. Even so, there would not be a gun in a matchbox. Pace v. Beto, 469 F. 2d 1389 (5th Cir., 1972). It is significant that

the search conducted by the officers, which led to finding the contraband, was not a search of the petitioner's person. Terry v. Ohio, supra; United States v. Robinson, 414 U.S. 218, 224 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). Nor was it a search of the area within his control.

The State has not justified the scope of this search. The area searched was not under the petitioner's control. It did not have the purpose of preventing him from obtaining weapons or destroying evidence. In scope, it went beyond where he could possibly reach. Chimel v. California, 395 U.S. 752 (1969).

For these reasons, the search violated the Fourth Amendment to the United States Constitution, and the evidence seized as a result thereof was inadmissable at the trial. Davis v. Mississippi, 394 U.S. 721 (1969).

Question for Review Number Two (restated): Whether the prosecutor's use of peremptory strikes to remove all black people from the jury panel deprives a black defendant of his right to due process of law and equal protection of the laws.

Petitioner argues that he was deprived of his right to a fair trial and his right to due process of law, when the State used seven of its ten peremptory challenges to systematically eliminate all black persons from the jury. Following the voir dire, and after the various challenges for cause

and peremptory strikes had been made, the petitioner complained to the Court of the systematic exclusion of the blacks from the jury by the State. As defense counsel stated,

> "Let the record reflect that after the final voir dire examination and the various challenges for cause had been made, that the following jury composition of prospective jurors and jury panel was composed of seven blacks, the record further state that the defendant nor his counsel struck any blacks, that the State used seven of its ten peremptory challenges to eliminate all seven black off of the jury. The basis upon such facts that this is systematic exclusion of blacks from the jury, and as such is denying the defendant, Mr. Ovide Duncantell, a jury of his peers through the systematic exclusion of blacks by use of the peremptory challenges, and as such the defendant, Ovide Duncantell, is being denied a fair and impartial trial by the members of his peers. At this time we challenge the jury and ask the Court to discharge the jury based upon the action of the district attorney.
>
> "THE COURT: Defendant's motion is overruled.
>
> "MR. CALDWELL: Please note our exception.
>
> "THE COURT: It is unsupported by any evidence.
>
> "MR. CALDWELL: May we put on some evidence, Your Honor?
>
> "THE COURT: What?
>
> "MR. CALDWELL: May we put on some evidence?
>
> "THE COURT: Overrule your objection. Bring in the jury." (S.F. pp. 74-75).

The prosecuting attorney did not object nor even contest the challenge that he had systematically eliminated all seven of the black persons from the jury panel. The Court of Criminal Appeals of Texas took the position that the parties may use their peremptory strikes in any way they wish, without any review whatsoever. The petitioner complains that this misuse of a system is analagous to the elimination of black persons and persons of Mexican-American descent from grand and petit juries. Hernandez v. State, 347 U.S. 475 (1954); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Ross v. Texas, 341 U.S. 918 (1951).

It is not the petitioner's contention that he has a right to be tried by any particular jury, or that he has a right to be tried by a jury containing black people. But he does have a right to be tried by a jury from which members of his race, as a race, have not been intentionally excluded or limited. See Justice Murphy dissenting in Akins v. Texas, 325 U.S. 398 (1945).

The petitioner contends that the Court erred in not permitting him to go forward with his proof or his offer of proof on this question. As in the Hill case, supra, the petitioner made out a prima facie case of denial of equal protection, which the State failed to meet.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Peter D. Williamson
Attorney for Petitioner
821 Americana Building
Houston, Texas 77002
(713) 751-0222

Of Counsel:

Jesse Funchess
Attorney at Law
6203 Del Rio
Houston, Texas 77021
(713) 747-2991

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been sent by United States mail, certified, return receipt requested, postage prepaid, addressed to:

Hon. Carol Vance
Harris County District Attorney
Harris County Courthouse
Houston, Texas 77002

this _____ day of _____, 1978.

Peter D. Williamson
Member of the Bar
United States Supreme Court

OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS

OVIDE DUNCANTELL, JR.,
NO. 51,749, v. --- Appeal from Harris County
THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for possession of marihuana. The jury assessed punishment at seven years, probated.

At approximately three o'clock in the morning of November 12, 1971, Houston Police Officers Miller and Trumble observed appellant's automobile slowly enter Dowling Street. Appellant was driving with his lights off although it was dark. Subsequently, he turned the lights on accelerated to an excessive rate of speed. He was eventually clocked at 47 miles per hour in a thirty miles per hour zone.

The officers were forced to pursue appellant for several blocks before he stopped. As Trumble approached appellant's automobile, appellant became angry and abusive and demanded to know why he was stopped. The automobile then "started to proceed forward from a dead stop" whereupon the officer removed the ignition key from appellant's car. Appellant then struck Trumble on the head.

Both officers opened the car door and told appellant that he was under arrest. When he refused to get out of the car they pulled him out.

A brief struggle ensued but the officers were able to wrestle appellant to the ground and place handcuffs on him.

Several other officers then arrived to give assistance in response to a call made by Trumble during the struggle. Miller asked Officer Bell to search the car. Bell testified that he was looking for "weapons or evidence." He found several matchboxes on the dashboard, one of which contained a substance later identified as marihuana.

Appellant testified that he was driving only about twenty-five miles an hour. When he stopped, the officers started cursing and beating him with flashlights. While he was under arrest he told the officers that he was not drunk and that Officer Bell was not coming from the direction of appellant's car when Bell showed appellant what he had found. On cross-examination he testified that Bell must have planted the marihuana on him.

Appellant initially complains of systematic exclusion of blacks from the jury. The thrust of his argument is that the State used its peremptory challenges to strike qualified blacks from the jury panel. The same argument was confronted and rejected in Ridley v. State, 475 S.W.2d 769, 772 (Tex.Cr.App. 1972), wherein we stated:

> "We hold that no systematic exclusion has been shown. To hold otherwise would in effect be abolishing our peremptory

> challenge practice which has always been a part of our system to help an accused as well as the State obtain an impartial and a fair trial."

See also Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed. 2d 759 (1965).

Appellant next contends that the court erroneously admitted evidence of an extraneous offense. He complains of testimony given by two State witnesses that he was under the influence of alcohol when he was arrested and that he was given a breathalyzer test at the police station.

Albrecht v. State, 486 S.W.2d 97 (Tex.Cr.App. 1972), is contrary to appellant's position. In that case we stated that evidence of extraneous offenses may be admissible "[t]o show the context in which the criminal act occurred--what has been termed the 'res gestae'--under the reasoning that events do not occur in a vacuum and that the jury has a right to hear what occurred immediately prior to and subsequent to the commission of that act so that they may realistically evaluate the evidence (footnote omitted)..." 486 S.W.2d at 100. See also Williams v. State, 535 S.W.2d 637 (Tex. Cr.App. 1976).

Next, appellant urges that the court improperly commented on the weight of the evidence. The court commented while Officer Miller was being cross-examined:

"Q. And you are as positive of that as

you are of all of the other testimony that you have given up to this point?

"A. Yes, sir.

"Q. And then if you find out that you were not positive about that and you were wrong about that, then your testimony would be that you are wrong about everything else that you have stated?

"THE COURT: That is argumentative."

No objection was made. Thus, nothing is presented for review. Adams v. State, 165 Tex.Cr.R. 523, 309 S.W.2d 245 (1958); Sikes v. State, 500 S.W.2d 650 (Tex.Cr.App. 1973).

Appellant contends that the court erred in permitting the State to bolster the testimony of Officer Miller.

Miller testified on direct examination that he initially noticed appellant's vehicle because its lights were off. Appellant attacked this testimony on cross-examination by having the officer read from his offense report. That report stated that the officers noticed appellant's vehicle because it pulled onto the street at an excessive rate of speed. The State later introduced into evidence Miller's relevant examining trial testimony as follows:

"Q. Do you remember being asked the question: 'What called your attention to the defendant?

"A. Yes, sir.

"Q. Would you read your answer?

"A. (Reading) "We were on routine patrol in that neighborhood, and I approached a station wagon backing onto Dowling Street headed into a southerly direction. The car seemed to halt without turning on its lights, and I did not know if he would turn on his lights or what, so I got in behind the vehicle.'

"Q. Do you remember being asked this question: 'What else called your attention to the vehicle?'

"A. Yes, sir, I do.

"Q. Would you read your answer?

"A. (Reading) 'When we got behind him, he seemed to speed up at a high rate of speed, and I was behind him to obtain a speed clock.'"

The court overruled the objection to the admission of this testimony.

Appellant attempted to impeach the witness by showing he made a prior inconsistent statement and the State then attempted to rehabilitate him by introduction of prior consistent testimony. In Kepley v. State, 167 Tex.Cr.R. 233, 320 S.W.2d 143 (1959), this Court held that where an attempt is made to impeach a witness by showing he made statements inconsistent with his trial testimony, he may be supported by showing that he made statements consistent with his trial testimony after the offense in question. See also 1 McCormick and Ray, Evidence, Section 774 (2d Ed. 1956). No error is shown.

Appellant next urges that the search of his automobile was unlawful and that as a result the trial court erred in overruling the motion to suppress evidence.

Appellant argues that neither the traffic offenses nor the assault carried with them fruits or instrumentalities for which there was probable cause to search. Officer Miller testified that he smelled alcohol on appellant's breath after the arrest. Miller observed "slow reaction, slurred speech, slow reaction and movement to the eyes." When asked whether he had formed the opinion that appellant was under the influence of intoxicating liquors, the officer replied only that, in his opinion, appellant was under "a form of intoxication."

It is common knowledge that usage of marihuana, or of a combination of marihuana and alcohol, often results in a form of intoxication. Such usage by appellant on the night of his arrest would explain his slow reactions and slurred speech as well as intoxication by alcohol only would explain them.

Therefore, Miller's observation of appellant's intoxicated condition, in conjunction with the evidence of flight and resistance of the arrest, established probable cause to search appellant's automobile for alcohol or narcotics and other contraband. The marihuana found in the matchbox on the dashboard was thus secured as the result of a legal

search. Cf. Attwood v. State, 509 S.W.2d 342 (Tex.Cr.App. 1974); Cazares v. State, 488 S.W.2d 455 (Tex.Cr.App. 1972). As this Court stated in Taylor v. State, 421 S.W.2d 403, 407 (Tex.Cr.App. 1967):

> "Once a bona fide stop or arrest has been made for a traffic offense, the police can make an additional arrest for any other offense unexpectedly discovered during the course of the investigation. If, while questioning a motorist regarding the operation of his vehicle, an officer sees evidence of a criminal violation in open view, or in some other manner acquires probable cause on a more serious charge he may arrest for that offense and indicent thereto conduct an additional search for physical evidence. See Goodwin v. United States, 121 U.S. App. D.C., 347 F.2d 793; Busby v. United States, 9 Cir., 296 F.2d 328; Riggins v. United States, D.C., 255 F.Supp. 777; United States v. Barnett, D.C., 258 F.Supp. 455; United States v. Clark, D.C., 247 F.Supp. 958. Under these circumstances, neither the arrest nor the search is tied to the traffic charge, but rather to the violation later discovered. Brown v. United States, 125 U.S. App. D.C. 43, 365 F. 2d 976; United States v. One Cadillac Hardtop, D.C., 224 F.Supp. 210. This is true even if no specific statement of fact of the second arrest is made. Brown v. United States, supra." (First emphasis supplied.) See also Borner v. State, 521 S.W.2d 852 (Tex.Cr.App. 1975).

In the instant case, probable cause to search appellant's automobile developed after he had been arrested for the traffic offenses and the assault. Applying the principal enunciated in Taylor, we

hold that the trial court did not err in denying the motion to suppress the seized evidence.

Appellant next complains of improper cross-evidence regarding a post-arrest conversation he had with Lieutenant DeFoor at the police station. Appellant apparently told the lieutenant that he had no complaints regarding his treatment by the arresting officers.

On direct examination appellant testified that he was brutally beaten by the arresting officers. The State attempted to impeach him on cross-examination by showing that he gave a prior inconsistent statement to DeFoor. Such impeachment was proper even though appellant had not been given his Miranda warnings before he made the statement in question. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); Small v. State, 466 S.W.2d 281 (Tex.Cr.App. 1971). The contention is overruled.

Appellant again complains of improper impeachment.

The record shows that Lieutenant DeFoor testified about his conversation with appellant at the police station. According to the officer, appellant told him that Houston Mayor Louie Welch had conspired to have the marihuana planted on him. Appellant's counsel objected to the admissibility of DeFoor's testimony concerning that conversation because appellant's Miranda rights were violated.

On appeal, appellant contends that DeFoor's testimony constituted improper impeachment. The ground of error presented on appeal must conform to the objection raised at trial. Cain v. State, 549 S.W.2d 707 (Tex.Cr.App. 1977); Bouchillon v. State, 540 S.W.2d 319 (Tex.Cr.App. 1976). Moreover, appellant made no objection whatsoever to the testimony of Police Inspector W. L. Williams, Police Chief Herman Short, or of Mayor Louie Welch insofar as they denied involvement in any conspiracy to have appellant arrested. Nothing is presented for review.

Appellant's next contention is that the court admitted prejudicial testimony pertaining to a collateral matter. The record reflects:

"Q. (By Mr. Bodiford) Mayor, concerning this statement that the defendant made in your presence before the City Council of Houston, what was the statement that he made?

"A. That for every black who was killed in the streets of Houston, ten pigs would die.

"Q. Do you know who he was referring to when he spoke of pigs?

"A. Police officers.

"Q. That for every black that was killed, ten pigs would be killed. Was that his statement?

"A. That was his statement.

"Q. Did you answer him?

"A. Yes, I think we answered him.

"Q. Do you know what your answer was?

"A. We didn't give much credibility to his threat.

"Q. Would it be advantageous to you at all to have Ovide Duncantell arrested?

"A. Politically, it was about as bad a thing that could have happened at that particular time. There was already -

"MR. CALDWELL: Your honor, I am going to object to this as being irrelevant and immaterial.

"THE COURT: Yes, I sustain the objection.

"Q. (By Mr. Bodiford) You didn't have any motive, then, for the arrest of Ovide Duncantell?

"A. None whatsoever."

It was developed on cross-examination that appellant had appeared before the Houston City Council several years before to protest the shooting of a sixteen-year-old black male by a while police officer. Welch testified that he thought appellant's statement was "more mouth than anything" and not a serious threat.

Appellant had previously testified that the arresting officers had beaten him and, after the State first developed the allegation, that the police were involved in a conspiracy to convict him for a crime he did not commit. The State, or any adverse party, may prove declarations of a

witness which tend to show bias, interest, prejudice, motive, or any other mental state affecting credibility. 1 McCormick and Ray, Evidence, Sections 670 and 677 (2d Ed. 1956). See also Parsons v. State, 102 Tex.Cr.R. 524, 278 S.W. 444, 446 (1926), wherein this Court stated:

> "No principal of evidence is more firmly settled than that which recognized that the interest of a witness and the motive or animus which operates upon his mind is a subject of material inquiry. The receipt of such evidence is obviously to enable the jury to determine the weight to be given to the testimony and the credibility of the witnesses."

The statement in the instant case disclosed appellant's hostility toward the police and a possible motive for alleging a police conspiracy to have him "framed." We hold that the court did not err in admitting the statement into evidence.

Appellant contends that the prosecutor improperly referred to an extraneous offense during jury argument. The record reflects:

> "...The testimony before you is that at the time the breathalyzer test was taken the alcoholic content of the defendant's blood was .7. Now, the defendant told you that he had two drinks before he left on his tour at eight o'clock that night, only two drinks before eight o'clock that night. Now, Mr. McDonald, the City chemist, told you that the burn-off rate of alcohol is .2 percent per hour. If he only had two drinks before eight o'clock, with a burn off rate of two percent per hour, there wouldn't have been one indication at all--"

For the reasons previously stated, the evidence regarding appellant's intoxication at the time of his arrest was properly before the jury. No error in the argument is shown.

We further observe that the objection made at trial was that there was no evidence as to the percentage of alcohol in appellant's drinks. Such objection was not sufficient to bring the trial court's attention to the error now complained of on appeal. Cain v. State, supra; Bouchillon v. State, supra.

Appellant again complains of improper jury argument. The record reflects:

"MR. BODIFORD: I ask that you recall his statement to the City Council. For every black killed, there will be ten pigs die."

This was in evidence. No objection was made to the argument now challenged. Thus, nothing is presented for review. Rodriguez v. State, 530 S.W.2d 944 (Tex.Cr.App. 1975); Jackson v. State, 516 S.W.2d 167 (Tex.Cr.App. 1974).

Appellant's final contention is that the prosecutor's jury argument at the punishment phase of the trial was improper. The record reveals that appellant was referred to as a "troublemaker" and as a "freeloader."

The State had established during the guilt phase of the trial that appellant had assaulted the arresting officers and that he had once threatened

the Houston Police Department with violence. The prosecutor's reference to him as a "troublemaker" was a reasonable deduction from the evidence. Cf. Cain v. State, supra.

With regard to the argument that appellant was a "freeloader", the State contends that such argument was a reasonable deduction from the evidence because appellant was going to school at the time and was apparently unemployed. We cannot agree that this type of argument is justified under these circumstances, but we find that the error was harmless.

No reversible error is shown. The judgment is affirmed.

Douglas, Judge

(Delivered March 15, 1978)

En Banc

Vollers, J., not participating

OVIDE DUNCANTELL, JR., Appellant
NO. 51,749 v. - - - Appeal from HARRIS County
THE STATE OF TEXAS, Appellee

DISSENTING OPINION

This case is before us pursuant to an out-of-time appeal granted to appellant by per curiam opinion in No. 49,828 on April 2, 1975.

At 3:30 a.m. on November 12, 1971, Houston Police Officers Miller and Trumble noticed appellant, then a candidate for the Houston City Council, entering Dowling Street in his car with his headlights out. Appellant turned his lights on but then increased his speed for forty-seven miles-per-hour in a thirty mile-per-hour zone. After pursuing appellant for more than ten blocks, the officers finally stopped him and pulled up beside his car. Appellant resisted removal from his automobile and, after a struggle, the officers subdued and handcuffed him on the ground outside his car. Miller testified that appellant appeared to be "under a form of intoxication."

In response to a call for assistance, other officers began arriving at the scene almost immediately. Officer Bell, in response to Miller's request, conducted a search of the interior of appellant's car, finding a penny matchbox containing marihuana on the driver's side of the dashboard. Bell testified that this search commenced while appellant was still lying handcuffed face down on

the ground with Miller and Trumble kneeling beside him. Miller testified that the search was conducted while appellant sat handcuffed in the back of his patrol car, with both officers standing next to him.

Appellant contends, among other things, that the search of his car was unlawful and that the State improperly impeached his testimony.

I cannot agree that the warrantless search which led to the discovery of the marihuana was constitutional, and I would reverse on this ground. I observe at the outset that this search cannot be justified as an automobile search based on probable cause and exigent circumstances. Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970); Scott v. State, 531 S.W.2d 825 (Tex.Cr.App. 1976); Stoddard v. State, 475 S.W.2d 744 (Tex.Cr.App. 1974). Neither the traffic offenses nor the assault carried with them fruits or instrumentalities for which there was probable cause to search. Thomas v. State, ___ S.W.2d ___ (No. 50,941, delivered March 10, 1976 and now pending on rehearing). The liquor which Officer Miller smelled on appellant's breath and his apparent intoxicated condition might have afforded cause to search for liquor. Thompson v. State, 398 S.W.2d 942 (Tex.Cr.App. 1966); Adair v. State, 427 S.W.2d 67, 74 (Tex.Cr.App. 1967) (dissenting opinion). But a search is reasonable only if its

scope is limited to the purpose which justified its initiation. Maldonado v. State, 528 S.W.2d 234 (Tex.Cr.App. 1975); Haynes v. State, 475 S.W. 2d 739 (Tex.Cr.App. 1971). A search for the purpose of discovering liquor should not extend into a matchbox. Compare Pace v. Beto, 469 F.2d 1389 (5th Cir. 1972). Nor did probable cause to search develop after appellant had been arrested and subdued. Cf. Taylor v. State, 421 S.W.2d 403 (Tex.Cr.App. 1967); Attwood v. State, 509 S.W.2d 342 (Tex.Cr.App. 1974); Borner v. State, 521 S.W. 2d 852, 856 (Tex.Cr.App. 1975).

Therefore, the search can only be upheld as a protective search for weapons or as a search incident to an arrest. It is well established that officers are justified in conducting a limited search for weapons after an investigatory detention, Terry v. Ohio, 392 U.S. 1 (1968); Baity v. State, 455 S.W.2d 305 (Tex.Cr.App. 1970); or even after an arrest for a routine traffic offense if the officer has reason to believe that he is in danger of bodily harm or that the suspect is armed or dangerous. Lewis v. State, 502 S.W.2d 699 (Tex.Cr. App. 1973); Wood v. State, 515 S.W.2d 300 (Tex.Cr. App. 1974); Borner v. State, supra at 855; Wallace v. State, 467 S.W.2d 608 (Tex.Cr.App. 1971). In this case, the appellant had already been either subdued and handcuffed on the ground or placed in the back of the patrol car, with two officers

guarding him, before the car search by a third officer began. Appellant was scarcely in a position to harm anyone, even if he could have lunged back into the car for a weapon. Cf. Imhoff v. State, 494 S.W.2d 919 (Tex.Cr.App. 1973). The officers testified at the trial that they were not in fear of their lives at the time the search was conducted. Beck v. State, 547 S.W.2d 266 (Tex. Cr.App. 1976); Keah v. State, 508 S.W.2d 836 (Tex. Cr.App. 1974); cf. Wood v. State, supra. Furthermore, it is hard to imagine a dangerous weapon being concealed in a penny matchbox, although this was the justification advanced for the search by the officers. Pace v. Beto, supra. I conclude, therefore, that the car search cannot be justified as necessary for the protection of the arresting officers.

The exception to the warrant requirement for searches incident to arrest, however, is broader than the protective Terry-type search. For one thing, its objects can include destructible evidence as well as weapons. Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964). The search of the person permitted by United States v. Robinson, 414 U.S. 218 (1973), after a routine traffic arrest, was much broader than that permitted by Terry v. Ohio, supra, even extending into a crumpled cigarette package. And the scope of the search incident to

arrest extends to areas under the arrestee's immediate control. Chimel, supra; Preston, supra. Clearly, the search could not extend to the locked glove compartment or the trunk of the car, since an arrestee could hardly reach these areas quickly and obtain a weapon or destroy evidence. Fry v. State, 493 S.W.2d 758, 761 (Tex.Cr.App. 1972); Wilson v. State, 511 S.W.2d 531 (Tex.Cr.App. 1974) (dissenting opinion, fn. 2).

There can be no question that appellant was under arrest at the time of the search. In contrast to the situations in Beck, supra, Thomas, supra, and Wilson, supra, he was not merely being detained during the writing of a traffic citation. The question becomes, then, was the scope of the search reasonably related to its purpose? The cases make it clear that the area searched must be under the arrestee's immediate control, and be for the purpose of preventing him from obtaining weapons or destroying evidence. Appellant was either face down on the ground with his hands handcuffed behind him or he was sitting in the back of the patrol car and the car being searched. There is no way the appellant could have reached a weapon or evidence in his car, since the car was no longer under his immediate control. Beck, supra; and see Chimel, supra. I would therefore hold that the search was not incident to appellant's arrest.[1/]

From all of the foregoing, I conclude that the search was unlawful and hence in violation of the Fourth Amendment of the United States Constitution as well at Art. I, Sec. 9 of the Texas Constitution. It follows that the trial court erred in failing to suppress the seized evidence and that the judgment should be reversed for this reason.

Roberts, Judge

(Delivered March 15, 1978)

En Banc

Phillips, J., joins in this dissent.

[1/] Neither can I agree that the search was legitimate as an "inventory search" or that the search was harmless because a later inventory might have been allowable. See South Dakota v. Opperman, 428 U.S. 364 (1976); Robertson v. State, 541 S.W.2d 608 (Tex.Cr.App. 1976). There is simply nothing in this record to show that an inventory search was undertaken or that such searches were a part of routine police practice. See Opperman, supra at 366, 369, 375-376.

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, April 5, 1978

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Rehearing in Cause No. 51,749, OVIDE DUNCANTELL, JR.

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,
GLENN HAYNES, Clerk

Supreme Court, U.S.
FILED
OCT 13 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

* * *

NO. 77-1831

* * *

OVIDE DUNCANTELL, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For Writ of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

CAROL VANCE
District Attorney
Harris County, Texas

JACK BODIFORD
Assistant District Attorney
Harris County, Texas

ALVIN M. TITUS
Assistant District Attorney
Harris County, Texas

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3281

Attorneys for Respondent

IN THE

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OCTOBER TERM, 1978

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To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its Attorney General, John L. Hill, in cooperation with Carol Vance, District Attorney, Harris County, Texas and files this its Brief in Opposition to Petitioner Ovide Duncantell, Jr.'s petition for writ of certiorari.

OPINION BELOW

In *Duncantell v. State*, 563 S.W.2d 252 (Tex.Crim.App. 1978) (en banc), the Texas Court of

Criminal Appeals ruled adversely to Petitioner's claim of illegal search and seizure. The Court reasoned that when Petitioner was stopped for a traffic violation, the police officer's observation of Petitioner's intoxicated condition, taken together with Petitioner's flight in resisting his arrest, established probable cause to search Petitioner's automobile for alcohol or narcotics. Accordingly, the Court concluded that the marijuana found on the dashboard of Petitioner's car was obtained as a result of a legal search.

The Texas Court of Criminal Appeals also rejected Petitioner's ground of error that the State's use of its peremptory strikes to eliminate blacks from the jury panel deprived him of his rights supported by the due process and equal protection guarantees of the Fifth and Fourteenth Amendments. The Texas court relied on its previous ruling in *Ridley v. State*, 475 S.W.2d 769 (Tex.Crim.App. 1972) and that of this Court in *Swain v. Alabama*, 380 U.S. 202 (1965), in holding that no systematic exclusion of blacks had been shown, and that a contrary decision would in effect abolish the Texas practice of peremptory challenges which have long been a part of the Texas system to help both the accused and the state obtain an impartial and fair trial.

JURISDICTION

The jurisdiction of this Court has been properly invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The following three questions are presented for review:

I. Whether this Court should review a Fourth Amendment claim that has been fully and fairly litigated in the state courts?

II. Whether the scope of the search of Petitioner's automobile properly extended into matchboxes located on the automobile dashboard?

III. Whether the prosecutor's use of peremptory strikes deprived Petitioner of his rights under the due process and equal protection clause?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was stopped by Houston Police in the predawn hours of November 12, 1971, for driving with his lights off and for exceeding the posted speed limit. Petitioner, who appeared intoxicated from ingestion of liquor, drugs, or both, attempted to flee from the police and became abusive and violent. A search of his vehicle yielded a matchbox containing marijuana. Petitioner was subsequently convicted in a jury trial for possession of marijuana. Petitioner's conviction was affirmed on direct appeal.

ARGUMENT

I.

THE RULING OF THIS COURT IN *STONE V. POWELL*, 428 U.S. 465 (1976), PRECLUDES REVIEW OF A FOURTH AMENDMENT CLAIM WHICH HAS BEEN FULLY AND FAIRLY LITIGATED IN THE STATE COURTS.

While Respondent recognizes that this Court's ruling in *Stone v. Powell, supra*, was made in the context of a

collateral attack on a state conviction, Respondent nonetheless urges that the rationale of this Court's ruling in *Stone v. Powell* is equally applicable to this petition for writ of certiorari. Where, as in this case, the Petitioner has been afforded the opportunity to fully and fairly litigate his Fourth Amendment claim in the state courts, the interest of preserving the integrity of the judicial process is only minimally furthered by affording an additional review of that claim by this Court. This Court has recognized that the state courts are under no less a compelling constitutional obligation to safeguard personal liberties and to uphold the law than are the federal courts. Furthermore, this Court has rejected the proposition that the state courts are less competent than the federal courts in applying federal constitutional law, especially in the context of search and seizure claims which the state courts deal with daily. Because the state courts are equally competent to safeguard federal constitutional rights, the disincentive for police misconduct created by the risk of exclusion of evidence in the state trial courts and the threat that a conviction will be overturned on direct appeal will not be appreciably enhanced by the prospect of further review on a granted writ of certiorari by this Court. Therefore, Respondent submits that further review of Petitioner's Fourth Amendment claim which has already been thoroughly litigated in the state courts is unnecessary to further deter violations of the Fourth Amendment.

II.

THE SCOPE OF THE SEARCH OF PETITIONER'S AUTOMOBILE PROPERLY EXTENDED TO MATCHBOXES ON THE AUTOMOBILES DASHBOARD.

Even if Petitioner could now be heard, his challenge to the legality of the search of his vehicle which produced

marijuana would be without merit.

During the early morning hours of November 12, 1971, as Officer Miller was performing routine patrol on Dowling Street in the City of Houston, Texas, he observed Petitioner entering Dowling Street (R. 106-108). Petitioner was driving his vehicle with his lights out though it was night (R. 108).

Petitioner subsequently turned his lights on and commenced "picking up to an excessive rate of speed" (R. 108). The officer clocked Petitioner at 47 miles per hour; the posted speed limit was 30 miles per hour (R. 110). Petitioner refused to stop after having been ordered to do so (R. 110-111). It was not until Petitioner came to a stop sign that he finally halted his vehicle (R. 113).

Officer Trumble, who accompanied Officer Miller, then approached Petitioner's car and explained to him that he was being stopped for speeding (R. 114). When asked to leave his vehicle and show his driver's license, Petitioner "proceeded on forward in his vehicle" (R. 117).

Officer Trumble managed to remove Petitioner's key from the ignition switch. However, while the officer was doing so, Petitioner "swung on the officer with his fist, striking him about the head" (R. 117). Petitioner ignored the officer's request for him to step from the vehicle (R. 116). When the officer proceeded to assist him out of the vehicle, "he started to struggle with us, fighting, we had to wrestle the man to the ground and secure him..." (R. 119). A subsequent search of the vehicle produced a matchbox which contained marijuana. The matchbox was found on the driver's side of the dashboard (R. 184).

From all indications, Petitioner was "under a form of intoxication" (R. 126-127). He had alcohol on his breath (R. 126). He had "slow reaction, slurred speech, slow reaction and movement to the eyes" (R. 127).

Petitioner does not here challenge the legality of the arrest. The record makes it abundantly clear that the police officers observed Petitioner driving his vehicle above the posted speed limit (R. 109-110). Consequently, the officers had a right as well as a duty to arrest Petitioner for the traffic violation. *Lane v. State*, 424 S.W.2d 925 (Tex.Crim.App. 1967), *cert. denied*, 392 U.S. 929 (1968).

In urging that the search of his car was unlawful, Petitioner asserts, "There were no fruits or instrumentalities of the speeding offense, for which there was probable cause to search." This assertion is unsound.

Officer Miller testified that after making the arrest for the traffic violation, he smelled alcohol on Petitioner's breath. In addition, Miller observed that Petitioner had "slow reaction, slurred speech, slow reaction and movement to the eyes." Hence, the officer justifiably formed the opinion that Petitioner was under "a form of intoxication."

It is well known, as stated by the Court of Criminal Appeals, that the usage of marijuana often produces a form of intoxication. This state of intoxication may be compounded by the use of alcohol. Simple logic dictates that such indulgence by Petitioner on the night of the arrest could have been accountable for his state of intoxication just as the usage solely of alcohol could have.

Hence, the circumstances presented in the instant case -- Petitioner's intoxicated condition, the evidence of flight and resistance of arrest -- clearly furnished probable cause to search Petitioner's vehicle for alcohol as well as for narcotics or any other contraband. It follows then that the search was legal as it was incidental to the arrest and not remote in time and place. *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Agnello v. United States*, 269 U.S. 20 (1925); *Weeks v. United States*, 232 U.S. 383, (1914).

While it may be argued, as Petitioner does, that the marijuana was not "fruit" of the traffic violation, the search was motivated not by the traffic violation, but by Petitioner's intoxicated state. Surely it is not contended that police officers possessing probable cause to stop and arrest Petitioner for one offense must be blind to plain evidence of another offense.

It is, therefore, quite clear that probable cause to search Petitioner's vehicle in the instant case developed after the arrest for the traffic offense and assault on the police officers. Thus, the holding of the Court of Criminal Appeals of Texas that the search was legal should be affirmed.

III.

THE PROSECUTOR'S USE OF PEREMPTORY STRIKES DID NOT DEPRIVE PETITIONER OF HIS RIGHT TO DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE CONSTITUTION.

Respondent asserts that Petitioner's claim that the prosecutor impermissibly used peremptory challenges to eliminate prospective black jurors from the panel is without merit in light of *Swain v. Alabama*, 380 U.S. 202 (1965). In that case, the Court recognized that the right to peremptory challenges is among the most important rights afforded to the accused. The function of the challenge is to eliminate extremes of partiality on both sides without inquiry into narrowly specified, legally cognizable bases of partiality. Thus, through the use of peremptory challenges, both sides may eliminate a juror for real or imagined partiality that may not be easily designated or demonstrated. Both white and

black prospective jurors are subject to the use of peremptory challenges, and the striking of all prospective black jurors in a case does not present a prima facia case that there has been a systematic exclusion of blacks from the jury. The presumption is that the prosecutor used the State's challenges to obtain a fair and impartial jury to try the case. Petitioner has utterly failed to overcome this presumption and therefore Respondent urges the Court to deny the petition for writ of certiorari.

CONCLUSION

For the reasons above stated, Petitioner has failed to present facts indicating that a review of his contentions is needed and, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

CAROL VANCE
District Attorney
Harris County, Texas

JACK BODIFORD
Assistant District Attorney
Harris County, Texas

ALVIN M. TITUS
Assistant District Attorney
Harris County, Texas

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3281

Attorneys for Respondent

PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas and a member of the Bar of this Court, hereby certify that a copy of the foregoing Brief in Opposition has been served by placing same in the United States mail, postage prepaid, certified, on this the ___ day of October, 1978, addressed to Peter D. Williamson, 821 Americana Building, Houston, Texas 77002.

GILBERT J. PENA
Assistant Attorney General